Nos. 14529, 14530 and 14531

United States Court of Appeals
For the Ninth Circuit

MATANUSKA VALLEY LINES, INC., a corporation,
Appellant,
vs.
DOROTHY NEAL and NATHANIEL NEAL, JR., *Appellees.*

MATANUSKA VALLEY LINES, INC., a corporation,
Appellant,
vs.
BLANCHE THOMAS, *Appellee.*

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vs.
WORDIE FRAZIER and PRINCE FRAZIER, *Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I. The District Court Erred In:

1. Denying appellant's motion to dismiss at the close of appellees' case, on the grounds that appellees had presented insufficient evidence of negligence on the part of Matanuska to constitute a *prima facie* case

2. Denying appellant's motion for directed verdict on the grounds that appellees had not presented sufficient evidence of negligence on the part of Matanuska to justify submission of the case to the jury

3. Denying appellant's motion to set aside verdict and

any judgment entered thereon, or in the alternative, motion for a new trial, on the grounds that there was not sufficient evidence to support the verdict.

Appellees assert (Br. p. 6) that there were many contradictions and disputed issues presented to the trial court, and conclude that there was ample evidence to justify the verdict and judgment. Certainly there were disputed issues. Of course the testimony of each witness varies in some degree from that of others who took the stand. But it must be remembered that appellees had the burden of proof to sustain. This, the record indicates, they failed to accomplish.

First, the testimony of each and every witness indicates that this collision occurred on Matanuska's side of the highway. The disinterested investigating officer, Keith F. Boyd, put this question to rest as follows:

> "Q. Does your report not show the incident to have occurred clearly on one side of the highway, Mr. Boyd?
>
> A. I believe so. The point of impact, I believe, was on my report, shown on the east." (R. 97)

The question was not leading. Its import is plain. And the officer was called as witness by appellees—not by Matanuska.

Second, the Matanuska driver had no notice that the oncoming truck would fail to negotiate the turn, cross the center line and tear the bus side with its bed. Appellees' principal witness, Reverend Johnson, asserted at pages 145-6 of the record:

> "When it was seen that the truck was not turning to its right as it should and that we were to be hit, the bus driver was helpless to avoid the acci-

dent because we were already as far over on our side of the road without going into the ditch."

Appellees' brief makes no effort to explain this testimony. Perhaps it speaks all too clearly for itself. And this evidence, so damaging to appellees' case, came from the lips of their own witness.

In appellant's opening brief (p. 9-10), reference is made to the familiar rule that a motorist travelling in a proper manner on his own side of the highway is entitled to assume that an oncoming vehicle will not suddenly turn across his path or into the side of his automobile. Appellees do not question the rule. Rather they attempt to avoid it by describing the approaching Williams' truck as an "approaching danger." Nowhere, however, do they point to evidence showing that the Matanuska driver had notice a reasonable time prior to the impact that Williams would not negotiate the curve. That was the crucial time. And it is upon a survey of conditions as they existed at *that* time that we must judge Matanuska's driver.

Let us suppose, however, for argument's sake only, that Matanuska should have been aware, at a reasonable time prior to impact, that Williams would cross the center line into Matanuska's lane of travel. What duty was then imposed on Matanuska? Appellees assert several such duties (Br. p. 5, 8). They state that the bus should have been brought to an immediate stop. The record, however, suggests otherwise (R. 347):

> "No, if I had stopped the bus at that time she would have hit me on the front side where the driver sits, but I did manage to turn it enough so she grazed along the side of the bus . . . "

Alternatively, appellees would require Matanuska to apply the bus brakes. On cross-examination, however, Lois Olson explained why she did not do so.

"Q. Now, did you attempt to apply your brakes?

A. No, because I was trying to get out of her way. If I had stopped, she would have hit the bus harder. This way she just grazed the side." (R. 368)

Appellees attempt to impose a third duty upon the Matanuska driver when they brand it negligence for her to have failed to sound the bus horn. Not only is this requirement rather tardily imposed, but no attempt is made to indicate in what way the sounding of a horn would have obviated the accident; there is no claim of proximate causation, nor any showing thereof. How many times appellate courts have pointed out that the law does not require the doing of the useless.

Finally, appellees further suggest that perhaps the negligence of Matanuska might be founded upon the speed of the bus. Notice how far the bus travelled after impact (100 feet), they point out. Candor should cause appellees to admit that a short and simple explanation exists for this rather appreciable distance that the bus traveled before coming to rest. On cross-examination, the Matanuska driver testified:

"Q. Now, did you attempt to apply your brakes after the impact?

A. Yes, I did, but my air pressure was knocked out. It didn't do any good.

Q. Your brakes were gone. Is that right?

A. Yes, because she cut the air line." (R. 369)

The evidence of negligence on the part of Matanuska,

so necessary to warrant submission of the case to the jury, is not present in the record.

We respectfully submit that the doctrine of *res ipsa loquitur* is not available to appellees to fill this deficit. While it is true that some jurisdictions have applied the doctrine to collision cases, the better reasoned and majority view is to the contrary. Blashfield, Cyc. of Auto. Law and Practice (Perm. Ed.) Sec. 6046, p. 456. As there stated:

> "The rule will not be applied where the evidence discloses that the injury might have occurred by reason of the concurrent negligence of two or more persons or causes, one of which was not under the management and control of the defendant . . . " See also *Estes v. Estes,* Mo. App., 127 S.W.2d 78; *Welch v. Greenberg,* 235 Iowa 159, 14 N.W.2d 266; *Jackson v. Martin,* 69 Ga. App. 344, 79 S.E.2d 406; *Hickory Transfer Co. v. Nezbed,* 202 Md. 205, 96 A.2d 241; *Vaughn v. Huff,* 186 Va. 144, 41 S.E.2d 482; 1 Shearman & Redfield, Law of Neg. (6th Ed.) Sec. 58b, p. 131.

In reviewing cases concerning the applicability of *res ipsa loquitur* to collision cases wherein a carrier is one of the defendants, it is pointed out at 161 A.L.R. 1116:

> "However, the applicability of the doctrine of *res ipsa loquitur* has been denied in a number of later cases involving actions by passengers on common carriers to recover for injuries sustained in a collision between the vehicle of the carrier and a vehicle not under the carrier's control.
>
> "Thus there are several Pennsylvania cases in which the court denied the applicability of the rule on the theory that a presumption of negligence on

the part of the carrier would not arise unless it appeared that the accident was caused by something connected with the means or appliances of transportation, and that the mere happening of the collision does not raise a presumption of negligence (Cases cited)."

Other jurisdictions which have denied the applicability of *res ipsa loquitur* in situations involving a carrier's collision with another vehicle include California, Florida, Illinois, Kansas, Maryland, Missouri, Nebraska, North Dakota, Ohio, Virginia and Washington. See 161 A.L.R. 1116.

Even California, the state from whence emanate many of the *res ipsa loquitur* cases relied upon by appellees, would not apply the doctrine to the instant fact pattern. In *Gritsch v. Pickwick Stages System* (1933) 131 Cal. App. 744, 22 P.2d 554, the court, while recognizing the rule as applicable to many cases of this type, held that it did not apply where the evidence showed that the other vehicle (*i.e.,* the non-carrier) was clearly negligent. In the *Gritsch* case, *supra,* the vehicle which failed to observe the traffic sign was the car which collided with the bus upon which plaintiffs were passengers.

In Matanuska's case, the vehicle which crossed the center line and brought about a collision on the wrong side of the road was not the bus, but rather the Williams' truck. Clearly the *res ipsa* doctrine should not be invoked here.

Although appellees argue (Br. p. 18) that the doctrine of *res ipsa loquitur* properly applied to the instant facts (Br. p. 19), they state that they did not rely on

this doctrine in the trial court. We respectfully direct this court's attention to the argument of Mr. Kay to the court in opposition to appellant's motion for a directed verdict (R. 312, 313), when he stated:

> "Another bus-truck collision in which the court approved the *res ipsa loquitur* instructions and held that the mere proof of the injury and the fare-paying passenger status were sufficient to go to the jury . . . "

It appears that appellees did rely on *res ipsa* in the trial court, but now retreat from that position, knowing full well that the doctrine cannot be properly applied to the facts of this collision.

In this reply brief, as in appellant's opening brief, principal attention and emphasis has been placed upon the facts of this accident. Appellate decisions concerning somewhat similar situations, such as those cited by appellees, are of little assistance to this court. The question of whether *this* record contains substantial evidence to support the verdict must, we respectfully submit, be answered negatively.

II. The District Court erred in giving the portions of Instruction No. 14 (R. 515-516) set forth in Appellant's Opening Brief, p. 16

The instruction given by the court speaks for itself. It was erroneously given for the reasons set forth in our opening brief. Colloquy between court and counsel (R. 501-504) strikingly illustrates the air of confusion which fostered the giving of this instruction. Appellant's detailed exception thereto appears at page 497 of the record.

III. The District Court erred in giving the portions of Instruction No. 18 (R. 519-521) set forth in Appellant's Opening Brief, pp. 18-19

It was and is appellant's position that this instruction patently confused the jury because of its extremely technical nature. It, too, speaks for itself. The confusion it engenders is, we submit, obvious. That jury members, without assistance of an accountant, could gain understanding or derive assistance from it seems incredible.

IV. The court erred in limiting the number of peremptory challenges allowed defendants (Br. p. 20 *ff.*)

Appellees seeks to avert meeting this question head-on. Rather, they assert, in effect, that while appellant might have been entitled to additional peremptory challenges, this right was conditional on good cause being shown.

As indicated in the discussion of this question in appellant's opening brief, these peremptory challenges are not conditional. Appellants contended in the lower court, and here reiterate, that they were entitled to the additional challenges as a matter of right, and not of grace. We submit that the cases cited in our opening brief clearly substantiate this contention.

Respectfully submitted,

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